APPENDIX "A"

IN THE SUPREME COURT OF ARKANSAS

No. CR 81-72

LOUIS HENRY VINSTON ..... *Appellant*

v.

STATE OF ARKANSAS ..... *Appellee*

December 21, 1981

Defendant was convicted in the Pulaski County Circuit Court, Fifth Division, Lowber Hendricks, J., of armed robbery, and he appealed. The Supreme Court, Hickman, J., held that: (1) where warrant had been obtained for defendant's arrest and thereafter detective arrested defendant and seeing his vehicle at garage decided it should be seized to prevent removal or destruction of any evidence or contraband, seizure of automobile was not unreasonable or in violation of Fourth Amendment; (2) where both victims testified they got good look at robbers and identification was made less than 24 hours after crime was committed, trial court did not err in admitting identification testimony, notwithstanding claim that victims were repeatedly taken through lineup and suggestions were made by police; and (3) evidence established sufficient chain of custody.

Affirmed.

Adkisson, C.J., dissented with opinion in which Purtle, J., joined.

1. SEARCHES AND SEIZURES

State has burden of justifying warrantless seizure of vehicle; however, automobile does not enjoy same constitutional protection that a home does because of its mobility and because one does not have same expectation of privacy in a vehicle as one would in a house. U.S.C.A. Const. Amend. 4.

2. SEARCHES AND SEIZURES

Seizure of vehicle is justified when confederates or others might remove vehicle. U.S.C.A. Const. Amend. 4.

3. SEARCHES AND SEIZURES

Where warrant had been obtained for defendant's arrest and thereafter detective arrested defendant and seeing his vehicle at garage decided it should be seized to prevent removal or destruction of any evidence or contraband, seizure of automobile was not unreasonable or in violation of Fourth Amendment. U.S.C.A. Const. Amend. 4.

4. CRIMINAL LAW

Whether identification is tainted depends upon opportunity to observe the criminal, accuracy of victim's description, amount of certainty of victim at time of confrontation and length of time between crime and identification.

5. CRIMINAL LAW

Where both victims testified they got good look at robbers and identification was made less than 24 hours after crime was committed, trial court did not err in admitting identification testimony, notwithstanding claim that vic-

tims were repeatedly taken through lineup and suggestions were made by police.

6. SEARCHES AND SEIZURES

Valid search warrant may issue based upon hearsay information as long as there is substantial basis from crediting hearsay.

7. SEARCHES AND SEIZURES

Where search warrant for vehicle was signed by one of detectives and was based on positive identification of defendant by robbery victims, search warrant was valid, notwithstanding claim that it was deficient because it was based on hearsay.

8. CRIMINAL LAW

In prosecution for robbery evidence that defendant's vehicle was towed to fenced lot used by police for storing such vehicles, that enclosure was locked, and that officer had to force open trunk because key that was taken from defendant would not open the trunk established sufficient chain of custody of items recovered from trunk of vehicle.

McArthur & Lassiter, P.A., Little Rock, for appellant.

Steve Clark, Atty. Gen., by Leslie M. Powell, Asst. Atty. Gen., Little Rock, for appellee.

HICKMAN, Justice.

Louis Henry Vinston was one of three men suspected of participating in an armed robbery of Henshaw Jewelry,

a small shop located in the Park Plaza Shopping Center in Little Rock, Arkansas. Late in the afternoon of October 30, 1980, two men, one black and one white, armed with pistols, forced the owners of the store, Mr. and Mrs. Henshaw, into a back room and proceeded to empty the display cases of jewelry and steal other valuable property in the store. During the course of the robbery, a white accomplice entered the store. It was estimated that the jewelry store was worth about $30,000 and the scrap gold taken was worth $36,000. Vinston was convicted of aggravated robbery and theft and sentenced to fifty years imprisonment for the robbery and twenty years for the theft. His sentences were enhanced because of four or more prior convictions.

Vinston's arguments of error on appeal relate to search and seizure, his identification, the validity of a search warrant, and the chain of custody regarding items taken from his vehicle. We find no merit to these arguments and affirm his convictions.

On Thursday afternoon, the 30th of October, 1980, Ralph Jones, the supervisor of the power plant at the shopping center, noticed suspicious conduct by two white males and one black male. He had been alerted earlier by a restaurant owner in the shopping center to be on the lookout for thieves who were stealing meat from the restaurant. The three men first drove up in a Buick automobile, parked, went into the shopping center, came out ten minutes later and left. Twenty minutes later all three returned in a Ford LTD automobile being driven by the black man. The three men got out of the car carrying green plastic bags. One of the white men returned to the Ford and left. Jones wrote down the license numbers and a description of both the Buick and the Ford on a scrap of paper. About the Ford he

wrote: ELP 871, LTD Four Door, 1977. Jones could not say which store the men entered.

During this period of time Henshaw's jewelry store was robbed. According to the Henshaws the robbers stayed for about fifteen minutes, none of them had masks on, and the store was well lit. After the robbery the Henshaws called the police. The next morning Jones, the plant supervisor, called the police and gave them a description of the vehicles that he had seen and related what he had observed. That same morning at 8:30 a detective took six photographs of black men to the Henshaws and both of them identified Vinston as one of the robbers.

The police learned that the Ford LTD automobile described by Jones belonged to Vinston. Based on all this information a warrant was obtained for Vinston's arrest and two detectives proceeded to the L & S Garage on Mabelvale Pike that Vinston owned an interest in. The two detectives arrested Vinston at the garage at 11:00 a.m., October 31, 1980, and seeing his vehicle decided that it should be seized to prevent removal or destruction of any evidence or contraband.[1] It was seized and towed to a lot used by the police for such vehicles. Three days later, on Monday, a search warrant was obtained for the Ford automobile. The trunk contained a shoulder holster, and numerous watches, rings and bracelets.

The day that Vinston was arrested the Henshaws and two other witnesses viewed a lineup and the Henshaws identified Vinston positively as one of the robbers.

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[1]The exact location of the vehicle is not in the record. It was at the garage, but whether it was on the public street or in a parking lot or space we cannot say.

Vinston argues on appeal that the seizure of his vehicle was unreasonable and was, therefore, in violation of the Fourth Amendment to the United States Constitution. We disagree.

[1] The State had the burden of justifying the warrantless seizure of the vehicle. *Cardwell v. Lewis*, 471 U.S. 583, 94 S.Ct. 2464, 41 L.Ed. 2d 325 (1974). However, the United States Supreme Court has consistently recognized that an automobile does not enjoy the same constitutional protection that a home does because of its mobility and because one does not have the same expectation of privacy in a vehicle as one would in a house. *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419 (1970). This has come to be known as the automobile exception and its application has many facets. This case does not fall within the rule that allows the search of part of the vehicle that is within the immediate reach or control of the one arrested. *New York v. Belton*, —— U.S. ——, 101 S.Ct. 2860, 69 L.Ed. 2d 768 (1981); *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed. 2d 685 (1969). This is a case similar to *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971). In the *Coolidge* case the police seized a vehicle in the driveway of a private residence without a warrant and seizure was held to be unreasonable because there were no exigent circumstances. In doing so, however, the court pointed out six circumstances that affected their decision, six reasons why exigent circumstances did not exist: 1. The police had known for some time of the probable role of the vehicle in the crime; 2. The defendant was aware that he was a suspect, had been cooperative and there was no indication he would flee; 3.

He had already had ample opportunity to destroy any evidence; 4. There was no suggestion that the vehicle was being used for an illegal purpose, and it was regularly parked in the driveway of his house; 5. The opportunity for search was not "fleeting"; and, 6. The objects the police assumed to be in the car were neither stolen, contraband, nor dangerous. The counterparts of these six reasons all exist in this case: 1. The robbery had occurred just the evening before; 2. Vinston was not contacted until he was arrested the next day at 11:00 a.m.; he had no reason to know that he was a suspect or that his car had been identified as being used in the robbery, so he would have no reason to destroy any evidence or remove any contraband; 3. The vehicle was not in a private driveway but at a business establishment; 4. There were two other suspects in the case, both white, who had not been identified or arrested at the time Vinston was arrested; 5. The police had good cause to believe that they would only have this "fleeting" opportunity to seize the vehicle before someone could remove the evidence or contraband; and, 6. The police had positive information that the vehicle was used in the crime and possibly contained evidence or stolen property.

[2] The seizure of a vehicle is justified when confederates or others might remove a vehicle. *U. S. v.* 1972 *Chevrolet Nova*, 560 F.2d 464 (1st Cir. 1977); *See* W. Ringel, Searches and Seizures, Arrests and Confessions, §11.3 (1980).

[3] In *Freeman v. State*, 258 Ark. 617, 527 S.W.2d 909 (1975), we held the seizure of the accused's automobile to be unreasonable. But *Freeman* is distinguishable for several reasons: The vehicle was located on private property at a

residence; Freeman was arrested two blocks away from his vehicle; and, there had been no positive identification of the vehicle seized as being the one used in the crime. Clearly, exigent circumstances existed warranting the seizure of Vinston's vehicle.

[4, 5] Vinston's argument that his identification at the lineup was too suggestive is also meritless. Both Henshaws pointed out Vinston from six photographs in the early morning after the robbery. It is argued that the Henshaws, Jones, the plant supervisor, and Cathy Meechan, a clerk at the store next door to the jewelry store, were repeatedly taken through the lineup and suggestions were made by the police. This argument is based primarily on the testimony of a lawyer who represented one of the white suspects, Mr. Storey, who co-owned the garage with Vinston. Evidently the police were not all that suggestive because neither of the two white suspects was identified. Only Vinston was identified and only the Henshaws identified him. Mr. Henshaw said he only viewed the lineup of the black men once. Mrs. Henshaw said she viewed it twice. Both denied that any suggestions were made to them and the two detectives verified their testimony. On appeal we review the totality of the circumstances to see if the trial court's decision was clearly erroneous. *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980). Whether an identification is tainted depends upon several factors: The opportunity to observe the criminal, the accuracy of the victim's description, the amount of certainty of the victim at the time of the confrontation and the length of time between the crime and identification. *Washington v. State*, 273 Ark. 482, 621 S.W.2d 216 (1981). Both Henshaws testified that they got a good look at the robbers. In this case the identification

was made less than twenty-four hours after the crime was committed. The trial court's decision admitting the identification evidence was not clearly erroneous.

[6, 7] The police obtained a search warrant for Vinston's vehicle on the Monday following the robbery. The warrant was signed by one of the detectives and it was based on the positive identification of Vinston by the Henshaws and the information supplied by Mr. Jones. It is argued that the warrant was deficient because it was based on hearsay and the warrant did not come within the test of *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed 2d 723 (1964). *Aguilar* dealt with an unidentified police informant and does not control. In this case the face of the warrant stated Mr. Jones' name and address, that he had observed Vinston's vehicle at the place of the robbery, and that Vinston had been arrested for the robbery. A valid warrant may issue based upon hearsay information as long as there is substantial basis for crediting the hearsay. *Rowland v. State*, 262 Ark. 783, 561 S.W.2d 304 (1978); *Flaherty v. State*, 255 Ark. 187, 500 S.W.2d 87 (1973), *cert. denied*, 415 U.S. 995, 94 S.Ct. 1599, 39 L.Ed. 2d 893 (1974). The search warrant was based on solid information.

[8] A rather weak argument is made that the State did not prove the chain of custody of the items recovered from the trunk of the vehicle. The unrefuted testimony of the officer was that the vehicle was towed to a fenced in lot used by the police for storing such vehicles. The enclosure was locked, and at night there were watch dogs running loose in the enclosure. The officer testified that he had to force open the trunk because the key that they had taken from Vinston would not open the trunk. Actually, Vinston claimed that he gave the officers permission to

search the vehicle at the time he was arrested and they refused to do so. He said he told them that the trunk could be opened by pulling a latch in the glove compartment of the vehicle. The officers testified that Vinston refused permission to search the vehicle when he was arrested. The officer said the trunk was forced because he did not know that this type of vehicle had a trunk latch in the glove compartment. The trial court was satisfied the State had shown a proper chain of custody and error has not been demonstrated by the appellant.

Affirmed.

ADKISSON, C.J., and PURTLE, J., dissent.

ADKISSON, Chief Justice, dissenting.

The police arrested appellant and seized his automobile. There was no testimony bearing on the appellant's location relevant to the car at the time of the arrest and seizure. We must, therefore, assume that the search incident to arrest doctrine has no applicability to this case.

This case is governed by *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971), which held that the police must obtain a warrant when they intend to seize an object outside the scope of a valid search incident to arrest. Warrantless searches are presumed to be unreasonable.

The State attempted to justify the seizure by proof of exigent circumstances recognized in *Coolidge* as sufficient to dispense with the warrant requirement. Although the majority finds this proof sufficient, it was, in fact, not sufficient because the determining factors making a warrant necessary in *Coolidge* are also present in this case. They

are: "advance police knowledge of the existence and location of the evidence, police intention to seize it, and the ample opportunity for obtaining a warrant."

Here the police knew in advance that they wanted to seize the car. They knew it was used in the robbery and that it was registered in the name of the appellant. The police had ample opportunity to obtain a search warrant for the car at the same time they requested the arrest warrant for the appellant.

I am hereby authorized to state that PURTLE, J., joins me in this dissent.

APPENDIX "B"

STATE'S EXHIBIT NO. "1"
(RIGHTS FORM)
APPENDED TO ORIGINAL TRANSCRIPT

LINEUP RIGHTS

DATE 10-31-80
TIME 1158 HRS.

LOUIS HENRY VINSTON, DOB NO. 4-6-50

You are being asked to participate in a lineup with several other people. Persons who are witnesses to crimes in which you are a suspect will view this lineup for a possible identification. You do not have a right to refuse to stand in this lineup.

You have the right to have an attorney of your choosing present during this proceedings or to confer with an attorney prior to this lineup. If you cannot afford an attorney, one will be appointed by the court to represent you.

However you may waive your rights to have an attorney present.

WAIVER

I have read this statement of my rights and understand them. I am willing to participate in a lineup without my attorney being present.

Called his attorney Kenneth Coffelt at 1205 hrs.

SIGNED:_____

WITNESSES: Larry Dunnington
J. D. Martin

APPENDIX "C"

STATE'S EXHIBIT NO. "9"
IN THE MUNICIPAL COURT OF LITTLE ROCK, ARKANSAS

80-61912

STATE OF ARKANSAS)
) ss.
COUNTY OF PULASKI)

AFFIDAVIT FOR SEARCH AND SEIZURE WARRANT

The undersigned, being duly sworn, deposes and says as follows: That he, the undersigned, has reasonable cause to believe and upon reasonable cause does believe that a particular automobile located at the storage lot used by the Little Rock Police Department, Penny's Wrecker Service, 6404 Geyer Springs Road, Little Rock, Arkansas and described as follows: a 1977 Ford, four door, white over gold LTD, Arkansas License Number ELP 871, VIN Number 7U645111686, has concealed therein fruits of the crime of Aggravated Robbery and Theft of Property of Henshaw Jewelry Store located at Park Plaza Shopping Center, University and West Markham Streets, on October 30, 1980, at approximately 5:40 p.m.

Said fruits of the crime include two hundred dollars ($200) in currency from the safe and forty dollars ($40) in currency from Mr. Henshaw, one Walther P-38 Auto Pistol, one Ansonia Antique Clock, one Howard Miller Chime Clock, one 1st Federal 30 month Stock certificate, eighteen (18) silver dollars, and approximately thirty thousand dollars ($30,000) in assorted diamonds and jewels, tending to demonstrate that an offense was committed and that certain persons committed it.

FACTS CONSTITUTING REASONABLE CAUSE:

1. The above described automobile belongs to Louis Vinston of 3325 W. 9th Street, Little Rock, Arkansas, a black male, thirty (30) years old, date of birth 4-6-50. This individual has been identified as a person involved in said aggravated robbery and theft of property and has been arrested and charged with said crime by the Little Rock Police Department.

2. That on October 30, 1980, the date of the commission of the said crime, at approximately 5:35 p.m. the above described automobile, registered to Louis Vinston, the above mentioned individual, was observed by Ralph Jones, 6300 B Street, Little Rock, Arkansas, an employee of the Park Plaza Shopping Center, at the power plant parking area for approximately five (5) to ten (10) minutes.

3. That the above mentioned Louis Vinston was arrested on October 31, 1980, and the above described automobile was impounded by members of the Little Rock Police Department at Penny's Wrecker Service, 6404 Geyer Springs Road, Little Rock, Arkansas at approximately the same time on October 31, 1980, and has remained in custody, locked and secured at the above location over the weekend until members of the Little Rock Police Department could obtain a search and seizure warrant.

THEREFORE, the undersigned prays that a search and seizure warrant issue for the above described automobile at Penny's Wrecker Service, 6404 Geyer Springs Road, Little Rock, Arkansas.

/s/ Larry Dunnington

L. Dunnington, Affiant
Detective, Little Rock Police Dept.

SUBSCRIBED AND SWORN to before me at 600 Markham St. on this 3rd day of November, 1980. I find that there is sufficient reasonable cause to issue a search and seizure warrant for the property described in the list above.

/s/ William R. Butler
Judge

APPENDIX "D"

STATE'S EXHIBIT NO. "10"
IN THE MUNICIPAL COURT OF LITTLE ROCK, ARKANSAS

80-61912

STATE OF ARKANSAS)
) ss.
COUNTY OF PULASKI)

SEARCH AND SEIZURE WARRANT

TO ANY SHERIFF, CONSTABLE OR POLICEMAN IN THE STATE OF ARKANSAS:

On Affidavit having been made before me by Det. Larry Dunnington, of the Little Rock Police Department, that he has reason to believe that in a 1977 Ford, 4 door, white over gold LTD automobile, Arkansas License Number ELP 871, VIN NO. 7U645111686, which is located at Penny's Wrecker Service, 6404 Geyer Springs Road, Little Rock, Arkansas, there is now being concealed certain evidence of the crimes of aggravated robbery and theft of property, said property being described as follows: two hundred and forty ($240) in currency, one Walther P-38 auto Pistol, one Ansonia Antique Clock, one Howard Miller Chime Clock, one First Federal Savings & Loan thirty (30) month stock certificate, eighteen (18) silver dollars and approximately thirty thousand dollars ($30,000) in assorted diamonds and jewels, tending to demonstrate that the offense of aggravated robbery and theft of property were committed and that certain persons committed them, and as I am satisfied that there is reasonable cause to believe that the above described property and evidence is concealed in the above

described premises, and that on the foregoing grounds reasonable cause for issuance of the Search Warrant exists.

YOU ARE HEREBY COMMANDED AND DIRECTED to search the 1977 Ford, 4 door, white over gold, Arkansas License Number ELP 871, VIN NO. 7U645111686, LTD automobile located at Penny's Wrecker Service, 6404 Geyer Springs Road, Little Rock, Arkansas, and to seize the above described evidence and property and to leave a copy of this warrant with the person in apparent control of said premises, or affix a copy of said warrant thereto, and to prepare a written inventory of the property seized and return this warrant and a copy of said inventory, and to store the property seized as required by law. Furthermore, this seach warrant shall be executed between the hours of 6:00 a.m. and 8:00 p.m. and within a reasonable time, not to exceed sixty (60) days from the date of issuance. Return shall be made to the issuing judicial officer within five (5) days after execution.

DATED this 3rd day of November, 1980.

/s/ William R. Butler
Judge